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No. 03-339

In the Supreme Court of the United States

JOSE FRANCISCO SOSA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

The Alien Tort Statute (ATS), 28 U.S.C. 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that the ATS is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the ATS.

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Pursuant to Rule 12.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully submits this response in support of the petition for certiorari in No. 03-339, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604. The initial panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045. The March 18, 1999 (Pet. App. 176a-219a) and

[1] The Solicitor General has authorized the United States to file a separate petition for certiorari from the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's claims in this case against the United States. The United States' petition cannot raise the questions presented by petitioner Sosa because those issues arise from the judgment entered only against petitioner Sosa and not from the claims against the United States. On August 27, 2003, Justice O'Connor granted the United States' application for an extension of time within which to file such a petition to and including October 1, 2003.

May 18, 1999 (Pet. App. 172a-175a) orders and the September 9, 1999 judgment (Pet. App. 140a-171a) of the district court are not yet reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1985, DEA Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen and a medical doctor, at the house while Camarena-Salazar was tortured. Pet. App. 4a.

In 1990, a federal grand jury indicted Alvarez-Machain for the torture and murder of Camarena-Salazar. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 n.2 (1992). After those negotiations proved unsuccessful, DEA approved the use of Mexican nationals to take custody of Alvarez-Machain in Mexico and transport him to the United States. Thereafter, several Mexican nationals, including petitioner Sosa, acting at the behest of the DEA, seized plaintiff from his office in Mexico, and in less than 24 hours transported him to the United States. Pet. App. 4a-5a.

Alvarez-Machain moved to dismiss the federal indictment against him, arguing that he could not be forced to stand trial in the United States on the ground that his seizure from Mexico was contrary to international law and a United States treaty with Mexico. This Court rejected that argument, holding that Alvarez-Machain's arrest "was not in violation of the Extradition Treaty," *Alvarez-Machain*, 504 U.S. at 670, and that, regardless of whether the arrest violated international law, he could be tried in this country "for violations of the criminal laws of the United States," *ibid.* The case was remanded for a trial, which took place in 1992. At the close of the government's case, the district court granted Alvarez-Machain's motion for acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, Alvarez-Machain brought this civil action in the United States District Court for the Central District of California, asserting tort claims against the United States, federal DEA officials, petitioner Sosa, and certain unnamed Mexican civilians. The complaint sought, *inter alia*, to hold the United States liable for false arrest under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671-2680, and petitioner Sosa and the individual federal defendants liable under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants and dismissed Alvarez-Machain's FTCA claims against the United States. In addition, the court granted summary judgment for Alvarez-Machain on his ATS claims against petitioner Sosa, reasoning that recovery was available because, the court believed, Alvarez-Machain's arrest and detention violated international law. The court held that Alvarez-Machain could recover damages under the ATS only for his detention in Mexico and, after a trial, entered a $25,000 damages award against petitioner Sosa. Pet. App. 6a-7a.

3. Alvarez-Machain and petitioner Sosa filed separate appeals. In September 2001, the court of appeals affirmed in part and reversed in part. Pet. App. 109a-139a. Among other things, the court affirmed "the district court's judgment with respect to [petitioner] Sosa's liability under the [ATS]." *Id.* at 139a. In so holding, the court concluded that Alvarez-Machain's "detention was arbitrary and, therefore, violated the 'law of nations.'" *Id.* at 119a. In addition, the court reversed the district court's dismissal of Alvarez-

Machain's FTCA claims against the United States and held that Alvarez-Machain could sue the United States for the tort of false arrest. *Id.* at 139a.

4. The court of appeals granted rehearing en banc, withdrew the initial panel's decision, and, by a 6-5 majority, issued a decision that reached the same result as the initial panel. Pet. App. 1a-108a. The court affirmed "the judgment with respect to [petitioner] Sosa's liability under the [ATS]" and "reverse[d] and remand[ed] the district court's dismissal of the FTCA claims against the United States." *Id.* at 64a.

a. In considering Alvarez-Machain's ATS claim, the en banc court reaffirmed the circuit's prior case law addressing "the scope of the [ATS]" and "delineat[ing] [its] contours." Pet. App. 9a-10a; see *id.* at 8a-14a. In particular, the en banc court explained, the Ninth Circuit has "resolved that the [ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 10a. Furthermore, drawing from the Ninth Circuit's prior case law, the court rejected as too "restrictive" petitioner's argument "that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of 'the law of nations' under the [ATS]." *Id.* at 11a.

Applying that understanding of the ATS, the en banc court held that an "arbitrary" extraterritorial arrest is an actionable violation of international law under the ATS. In finding that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," the court pointed in particular to provisions of the Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948), the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966), and to the Restatement (Third) of Foreign Relations.

See Pet. App. 25a-26a & n.18. Furthermore, the court concluded that respondent's arrest was arbitrary, and thus an actionable violation of the law of nations under the Ninth Circuit's understanding of the ATS, because, the court held, the arrest was not authorized by United States or Mexican law. See *id.* at 29a-44a.

b. Judge O'Scannlain, joined by Judges Rymer, Kleinfeld, and Tallman, dissented. Pet. App. 72a-96a. Judge O'Scannlain found "astounding" the majority's decision "divin[ing] the entitlement to recovery from the [ATS]" based on the alleged violation of international law in this case. *Id.* at 73a. Although he assumed that some violations of international law may be actionable under the ATS, Judge O'Scannlain concluded that "no claim can prevail where the United States, through its political branches, does not acquiesce in an international norm." *Id.* at 74a-75a; see *id.* at 80a. In Judge O'Scannlain's view, a "norm" of international law "to which the political branches of our government have refused to assent is not a universal norm [that is actionable under the ATS]" and "[i]t is not the judiciary's place to enforce such a norm contrary to their will." *Id.* at 81a.

Judge O'Scannlain concluded that Alvarez-Machain's claim for damages under the ATS for arbitrary arrest is not actionable under the ATS. As he explained, "[e]xamining the relevant statutes, the actions of the political branches in other circumstances, and * * * the manner in which the President and the Senate have exercised the treaty power in this area," there is "only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws." Pet. App. 86a-87a (footnote omitted). Regarding the claimed private right of action, Judge O'Scannlain observed that the ICCPR "was signed and ratified in 1992 but with the understanding by the

Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals" and the political branches have refused to recognize that the Universal Declaration creates "binding legal obligations." *Id.* at 87a n.12. Moreover, Judge O'Scannlain explained, "the DEA was well within its delegated powers [under domestic law] when arresting Alvarez." *Id.* at 92a.

In Judge O'Scannlain's view, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make." Pet. App. 96a. As he explained, the political branches, "unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security." *Ibid.* Moreover, Judge O'Scannlain observed, the majority's decision in this case has important implications for the "international war on terrorism." *Id.* at 72a.

c. Judge Gould separately dissented. Pet. App. 97a-108a. In his view, "this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision." *Id.* at 97a. As he explained, "by holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 104a. Moreover, Judge Gould emphasized, such judicial review "allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis" and "prevents our government from speaking with a single voice on an important foreign policy decision." *Id.* at 103a-104a.

ARGUMENT

The Court should grant the petition and resolve the threshold questions presented concerning the proper scope and application of the ATS. Although the ATS was scarcely used throughout the first two hundred years of the Nation's history, ATS claims have proliferated in the past few decades. With increasing frequency, and as exemplified by the divided en banc court of appeals' decision in this case, lower courts have struggled over the meaning and scope of the ATS. There is sharp disagreement over whether the ATS is merely a grant of jurisdiction or, instead, not only confers jurisdiction but also establishes a private right of action. That issue has profound separation-of-powers implications and serious consequences for both the development and expression of the Nation's foreign policy. Among courts that have concluded that the ATS creates a cause of action, there also is widespread disagreement over what types of international-law-based claims are actionable. The potential impact of this case on the actions of the Executive abroad is great and further heightened by the Nation's ongoing war against terrorism. Under the decision below, the ATS may serve as an instrument for litigants seeking judicial supervision of and monetary sanctions on the appropriateness of actions taken by this Nation and its allies in foreign lands.

This case also presents an important question concerning the authority of domestic law enforcement authorities to conduct arrests abroad. By holding that the statute authorizing arrests by DEA agents precludes agents from enforcing United States law extraterritorially—including those laws that by their very terms have extraterritorial effect—the en banc Ninth Circuit's decision in this case threatens the government's ability to conduct necessary law enforcement operations abroad in its efforts to combat terrorism, international crime, and the flow of illegal drugs into the

United States. The Solicitor General has therefore authorized the United States to file a separate petition for certiorari seeking review of the judgment in this case, raising that issue. That petition is due October 1, 2003.

A. The Questions Presented Are Exceptionally Important

The ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. The provision was enacted in 1789 as part of the first statute passed by Congress on the judiciary, Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76, and, although it has been amended in certain nonsubstantive respects, has remained largely unchanged for the past 215 years. For most of its history the ATS has existed as an obscure provision of the United States Code, a "legal Lohengrin," *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), which was invoked only on a few occasions, and which became even less relevant after the enactment of general federal question jurisdiction in 1875. Act. of Mar. 3, 1875, ch. 137, § 1, 18 Stat. (Pt. 3) 470.

That changed in 1980. In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the first court of appeals' decision to expound on the ATS at length, the Second Circuit held that the ATS authorized a damages action brought in federal court involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. As the Second Circuit itself has recently recognized, in the wake of the *Filartiga* decision, "[q]uestions surrounding the purpose and scope of the [ATS]" have "attract[ed] substantial judicial attention." *Flores* v. *Southern Peru Copper Corp.*, No. 02-9008, 2003 WL 22038598, at *6 (2d Cir. Sept. 2, 2003); see *id.* at *6-*10. As explained in Part B, *infra*, those questions have engendered controversy in the lower courts. Indeed, in

the past few decades, the ATS has been transformed by lower courts from a rarely invoked statutory provision into a prodigious font of litigation involving efforts by aliens to bring claims for alleged violations of their human rights in the United States courts, even with respect to events that are entirely extraterritorial, like the alleged violations in *Filartiga*.

In addition, as the court of appeals' decision in this case illustrates, some lower courts have inferred from the jurisdictional provision of the ATS a right of action on behalf of aliens to enforce in the United States courts not only alleged violations of self-executing treaties, but also violations of non-self-executing and unratified treaties, and even non-binding resolutions of the United Nations General Assembly. That interpretation of the ATS has thrust the federal courts into an unprecedented role of defining what principles of customary international law are privately enforceable in the United States and effectively binding the United States to treaties or resolutions to which the Executive Branch has declined to accede. As Judge Randolph recently observed, "[t]o have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (concurring opinion), petition for cert. pending, Nos. 03-334 & 03-343 (filed Sept. 2, 2003).

The use of the ATS by aliens to seek relief for violations of international law by foreign actors or others in foreign lands also has immediate foreign policy consequences for the United States and its allies. Although ATS claims are often asserted against rogues or human-rights abusers, the claims are not limited to such defendants and may also be asserted against allies of our Nation. In this case, for example, respondent has asserted ATS claims against a foreign national

who assisted the United States in the seizure abroad of an indicted criminal. When courts issue judgments in connection with such ATS litigation concerning the extent to which alleged acts do or do not violate the law of nations, they threaten the fundamental constitutional principles that reserve to the political branches the authority to make judgments about how to conduct the Nation's foreign affairs and that seek to ensure that the Nation speaks with one voice on such matters. See *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); see also *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Indeed, even the en banc court below observed that "international human rights litigation under the [ATS] inevitably raises issues implicating foreign relations." Pet. App. 18a; see note 9, *infra*.

The threshold question presented by petitioner Sosa is whether the ATS is a grant of subject matter jurisdiction or, instead, also creates a private cause of action. That issue is properly presented by this case. In an earlier appeal, petitioner Sosa argued that, although the ATS confers jurisdiction, it does not "create a substantive, federal right like the [Torture Victim Protection Act]." *Alvarez-Machain* v. *United States*, 107 F.3d 696, 703 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1987). The Ninth Circuit rejected that argument and held that the ATS "has a substantive as well as jurisdictional component." *Ibid.* In addition, as noted above, in resolving the instant appeal, the en banc court specifically reaffirmed that the Ninth Circuit has "resolved that the [ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Pet. App. 10a. Furthermore, the question whether the ATS creates *any* private right of action is logically anterior to the question on which the en banc court divided below, *i.e.*, whether the alleged violation of international law in this case is actionable under the ATS.

This case therefore presents a timely and appropriate vehicle for this Court to provide vitally needed guidance on the scope of the ATS.

B. The Lower Courts Are Divided Over The Scope Of The ATS

Nearly two decades ago, in the District of Columbia Circuit's fractured opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), Judge Edwards observed that this "area of law * * * cries out for clarification by the Supreme Court." *Id.* at 775 (concurring opinion). As the Second Circuit recounted in *Flores* just three weeks ago, after the petition here was filed, the controversy in the lower courts "regarding the meaning and scope of the [ATS]" has only deepened since *Tel-Oren*. *Flores*, 2003 WL 22038598, at *10. Indeed, the *Flores* court stressed that the disagreement over the meaning of the ATS raises "complex and controversial questions" that "can be resolved only by Congress or the Supreme Court." *Ibid.*[2]

a. As discussed, in *Filartiga*, the Second Circuit allowed an ATS action to proceed involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The Second Circuit has stated that, "[b]y allowing the plaintiffs' claim to proceed, the *Filartiga* Court not only held that the [ATS] provides a jurisdictional basis for

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[2] This Court has not addressed the scope of the ATS. The underlying claim in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), was brought under the ATS, and the United States filed an amicus brief in support of the petitioner in *Hess*, which argued, *inter alia*, that "the Alien Tort Statute (like the federal question statute) is only jurisdictional in nature" and therefore "does not create a cause of action in favor of an alien for a violation of the law of nations." U.S. Br. 13 n.11. However, this Court decided *Hess* on the ground of foreign sovereign immunity and therefore did not consider the scope of the ATS. See 488 U.S. at 434-435.

suit, but also recognized the existence of a private right of action *for aliens only* seeking to remedy violations of customary international law or of a treaty of the United States." *Flores*, 2003 WL 22038598, at * 6; see *Kadic* v. *Karadzic*, 70 F.3d 232, 241-244 (2d Cir. 1995), cert. denied, 518 U.S. 1004 (1996); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).[3]

b. Four years after *Filartiga*, in *Tel-Oren*, the District of Columbia Circuit issued a fractured decision exploring the ATS. In *Tel-Oren*, the survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the PLO brought ATS claims in the District Court for the District of Columbia. The court of appeals affirmed the dismissal of those claims, but each member of the panel stated "different reasons for affirming th[at] result." 726 F.2d at 775 (per curiam). Judge Bork concluded that the ATS is a purely jurisdictional statute and does not provide the plaintiffs a cause of action or a substantive right to sue for violations of international law. *Id.* at 801-811. He further concluded that neither the treaties cited by plaintiffs in that case, nor international law by itself, conferred on plaintiffs a cause of action. *Id.* at 816. In addition, Judge Bork observed that "[w]hat little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations" and, Judge Bork stated, "[a] broad reading of section 1350 runs directly contrary to that desire." *Id.* at 812.

[3] The *Filartiga* court did not specifically opine on whether the ATS itself created a private cause of action, but, as noted, the Second Circuit has recently stated, in reviewing its case law, that "*Filartiga* * * * recognized the existence of a private right of action." *Flores*, 2003 WL 22038598, at * 6.

Judge Robb did not reach the question of whether the ATS is merely jurisdictional or instead creates a private cause of action. Rather, in his view, the proper resolution of the case lay in holding that the plaintiffs' ATS claims were "nonjusticiable" under "the political question doctrine." *Tel-Oren*, 726 F.2d at 823. In so holding, however, Judge Robb observed that the Second Circuit's decision in *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5. As he explained, the *Filartiga* court "failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat." *Ibid.*[4]

c. The Ninth Circuit was the next circuit to address the ATS. In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (1992), cert. denied, 508 U.S. 972 (1993), the court of appeals held that a court in an ATS action may define and enforce the law of nations as part of its common law powers. See *id.* at 499-503. Three years later in *Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-1476 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), that same court of appeals held that the ATS is not merely jurisdictional but instead also creates a cause of action to enforce the "law of nations." As discussed above, the Ninth Circuit reaffirmed that understanding of the ATS in its en banc decision in this case. See Pet. App. 10a.[5]

[4] Judge Edwards agreed with the Second Circuit's decision in *Filartiga*, but concluded that a torture claim may only be asserted against a state actor. *Tel-Oren*, 726 F.2d at 775-798.

[5] The Ninth Circuit is currently considering en banc the panel's decision in *Doe I* v. *Unocal Corp.*, Nos. 00-56603 & 00-56628 (argued June 16, 2003). In that case, residents of Myanmar (Burma) brought an ATS

d. The Eleventh Circuit has joined the Second Circuit and the Ninth Circuit and has held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir.), cert. denied, 519 U.S. 830 (1996).

e. More recently, in *Al Odah* v. *United States*, *supra*, the District of Columbia Circuit rejected ATS claims asserted against the United States by the next-friends of aliens detained at the U.S. Naval Base at Guantanamo Bay. The court of appeals unanimously held that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), aliens outside the United States had no right to sue in United States courts regarding their detention under any jurisdictional theory. The *Al Odah* decision accordingly did not reach or address any issues concerning the nature of scope of the ATS. In a separate concurrence, however, Judge Randolph reiterated the position expressed by Judge Bork in *Tel-Oren*, that the ATS

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action against a California corporation (Unocal) and the Myanmar military government. The plaintiffs alleged that they were subjected to forced labor, murder, rape, and torture in connection with the construction of a pipeline in Myanmar. The district court granted summary judgment for Unocal on the ATS claims, finding that plaintiffs could not show that Unocal acted under color of law or otherwise participated in abuses committed by the military government. 110 F. Supp. 2d 1294 (C.D. Cal. 2000). The Ninth Circuit reversed, holding that Unocal could be held liable under the ATS on the theory, which the panel derived from its assessment of customary international law, that Unocal aided and abetted the Myanmar military government in committing forced labor, murder, and rape (but not torture). 2002 WL 31063976 (Sept. 18, 2002). The Ninth Circuit vacated the panel's decision and set the case for en banc consideration. 2003 WL 359787 (Feb. 14, 2003). The United States filed an amicus brief in support of Unocal in the en banc proceeding, arguing, *inter alia*, that the Ninth Circuit should revisit its ATS case law and hold that the ATS does not create a private right of action, but instead is merely jurisdictional. See Pet. App. 220a-249a. On May 9, 2003, the United States submitted a copy of its *Unocal* brief to the en banc court in this case.

"does not create a cause of action," and the one by Judge Robb in *Tel-Oren*, "that *Filartiga* is 'fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Al Odah*, 321 F.3d at 1146 (citing *Tel-Oren*, 726 F.2d at 801 (Bork, J.); 726 F.2d at 826 n.5 (Robb, J.)).[6]

Judge Randolph reasoned that the ATS provides the courts with jurisdiction, but does not confer a cause of action. As he explained, under the United States Constitution, "Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah*, 321 F.3d at 1147. Moreover, Judge Randolph observed that, "[t]o hold that the [ATS] creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing." *Id.* at 1146.

In *Flores*, after discussing the opinions in *Tel-Oren* and *Al Odah*, the Second Circuit stated that "the law of the District of Columbia Circuit stands in contrast to that of our Circuit and of the other Circuits that have followed our holding in *Filartiga*." 2003 WL 22038598, at *8. To be sure, no decision of the District of Columbia Circuit has commanded a single rationale for rejecting *Filartiga* (and the panel declined to reach the ATS issue in *Al Odah*). However, a majority of the court in *Tel-Oren* did reject *Filartiga* (albeit for different reasons). And, as the Second Circuit recognized in *Flores*,

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[6] Although Judges Garland and Williams did not join Judge Randolph's concurring opinion, "they d[id] not intend thereby to express any view about its reasoning." *Al Odah*, 321 F.3d at 1145 n*. Rather, they believed that the issues addressed by Judge Randolph did not need to be reached. *Ibid.*

the District of Columbia Circuit's case law "stands in contrast to" the expansive interpretation of the ATS that has been adopted by the circuits following *Filartiga*. Moreover, because many of the suits brought under the ATS involve wholly foreign activities without any nexus to a particular circuit, plaintiffs have substantial latitude in avoiding the District of Columbia Circuit and, in practice, have channeled ATS claims to circuits that have embraced *Filartiga*.

The importance of the questions presented concerning the ATS, and the fact that the case law discussed above substantially fleshes out the competing positions on the scope of the ATS that have been adopted by the lower courts, counsel against waiting for a more concrete circuit conflict to materialize, while plaintiffs continue to file ATS suits in the Second and Ninth Circuits that implicate potentially sensitive foreign affairs issues.

C. The Ninth Circuit's Resolution Of Alvarez-Machain's ATS Claim Is Fundamentally Flawed

The en banc court's conclusion that Alvarez-Machain "has established a violation of the law of nations that is actionable under the [ATS]," Pet. App. 71a, is the product of several different legal errors, including, perhaps foremost, the en banc court's threshold determination that the ATS supplies anything more than a grant of jurisdiction. *Id.* at 10a.

1. The plain language, placement in the United States Code, and history of the ATS strongly suggest that the provision only establishes subject matter jurisdiction over a particular class of suits, and does not create a private right of action. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. Sections 1 through 13 of the Act established the federal courts and delineated the jurisdiction of those courts.

1 Stat. 73-81. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. See 1 Stat. 76. The ATS is thus naturally read, like those related provisions, as being solely a jurisdictional provision and, indeed, that is how it was viewed at the time of its creation. See Opinion on Fugitive Slaves (Dec. 3, 1792), in 6 *The Writings of Thomas Jefferson* 142 (Paul Leicester Ford, ed., 1895) (opinion of Sec'y of State Jefferson) (citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added); see also *Montana-Dakota Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").

That construction of the ATS is also consistent with what is known of its origins. Although there is no direct legislative history regarding the ATS, the available evidence indicates that Congress passed this jurisdictional provision, in part, against the background of two high profile incidents of the time concerning assaults on foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. Cont. Cong. 109, 111 (1788)). These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-494 (1986).

The jurisdiction granted to the fledgling federal courts by Article III of the Constitution was not self-vesting. And Congress did not enact a general federal question statute

until nearly 100 years later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases —*i.e.*, cases arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States, under Acts of Congress executing treaties, or under "treaties of the United States." The Judiciary Act of 1789 thereby ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such laws.

Furthermore, a year after passing the first Judiciary Act, Congress invoked its authority under Article I, Section 8, Clause 10 of the Constitution to define and punish violations of the "Law of Nations," and made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone) statutory offenses under federal law. Act of Apr. 30, 1790, ch. 9, §§ 8-13, 25-28, 1 Stat. 113-115, 117-118; see 4 William Blackstone, *Commentaries on the Laws of England*, 68 (1769) ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."). Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into—*i.e.*, "animadverted on" by—the laws of the United States. The action of the First Congress, in adopting the three traditional concepts from the law of nations into the positive law of the United States, demonstrates that Congress knows how to do so when it wishes. In this case, there is no such Act of Congress defining the law of nations to include the alleged international "norms" on which Alvarez-Machain relied, much less creating a private right of action for a violation of such norms.

Under this understanding of the ATS, a plaintiff must show that *Congress* has enacted a cause of action to establish an actionable claim under the ATS, just as a plaintiff must point to an "unambiguously conferred right" (*Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002)) to maintain an action under 42 U.S.C. 1983. Such a cause of action would also fall within the present-day federal question jurisdiction (28 U.S.C. 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789, or even in 1979. General federal question jurisdiction was not enacted until nearly 100 years later, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. Until 1980 therefore, the ATS ensured that efforts to sue ambassadors, even if involving insubstantial monetary amounts, would be cognizable in federal court. The courts have recognized that the elimination of the amount-in-controversy requirement in 1980 rendered numerous jurisdictional provisions superfluous. See, *e.g.*, *Erienet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991). In the case of the ATS, however, at the very time that Congress obviated the specific need for the little used ATS, the *Filartiga* court provided it with a fundamentally misconceived and problematic new role.

2. The Ninth Circuit's reading of the ATS as a broad grant of implied rights of action not only does not square with the statute's text and history, it cannot be reconciled with this Court's repeated refusal in recent decisions to recognize implied private causes of action in the absence of a clear congressional intent to create such rights. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*,

510 U.S. 471, 483-486 (1994). Indeed, in *Sandoval*, this Court emphasized that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to newly minted as well as older statutes, such as the ATS. *Ibid.*

As this Court has admonished, in determining whether Congress has created a private cause of action, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. No "'rights-creating' language" is set forth in the ATS and, indeed, by its own terms, the ATS is a *jurisdiction*-vesting provision. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), the ATS does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages.

The Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, underscores that Congress knows how to create an express cause of action for the violation of international law when it wants to. That Act explicitly creates a private cause of action on behalf of both aliens and non-aliens who have suffered acts of torture at the hands of an individual acting under color of law of a foreign nation. See 28 U.S.C. 1350 note. The Act, moreover, carefully specifies the nature of actionable violations, legal standards, and statute of limitations governing the cause of action. Under the Ninth Circuit's construction of the ATS, the TVPA was entirely unnecessary for alien claimants.[7]

[7] To be sure, the House Report on the TVPA states that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." H.R. Rep. No. 367, 102d Cong., 1st Sess., Pt. 1, at 4 (1991); see S. Rep. No. 244, 102d Cong., 1st Sess., at 4-5 (1991). But a statement in a committee report is not a law. Moreover, whatever weight a court may give such legislative history in the context of interpreting the statute accompanying the report *i.e.*, the TVPA, it is entitled to little if any weight in interpreting a statute, like the ATS, enacted by a *prior* Congress.

3. Even assuming that the ATS is not merely jurisdictional and creates a cause of action for some violations of international law, the Ninth Circuit in this case clearly erred in inferring a cause of action under the ATS for violation of non-binding international agreements that indisputably were not intended by the President or Congress to create rights capable of domestic enforcement through legal actions by private parties.

a. The Ninth Circuit has an established practice of inferring rights of action to enforce rights based on international agreements that the United States has refused to join, *non*-binding agreements, and agreements that are not self-executing, as well as political resolutions of United Nations bodies and other non-binding statements. See, *e.g.*, Pet. App. 25a-26a; *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383-1384 (9th Cir. 1998). In this case, for example, the court found an actionable violation of international law under the ATS based on provisions of the Universal Declaration, *supra*, a non-binding resolution of the General Assembly of the United Nations; the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, to which the Senate *refused* to give its consent; and the ICCPR, *supra*, a non-self-executing treaty. See *Flores*, 2003 WL 22038598, at *25 n.35; *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In ratifying the ICCPR (as well as other human rights treaties), the Senate and the Executive Branch expressly agreed that the ICCPR would not be self-executing so it could not be relied on by individuals in domestic court

proceedings. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). Other courts of appeals uniformly have recognized that the ICCPR is neither self-executing nor enforceable through jurisdiction granting provisions such as the habeas corpus statute.[8]

If the political branches of the United States refuse to ratify a treaty, or regard a United Nations resolution as non-binding, or declare a treaty not to be self-executing, there is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. See *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). The Second Circuit recently rejected the Ninth Circuit's practice of looking to such documents to discern the "law of nations" in an ATS case. See *Flores*, 2003 WL 22038598, at *19-*20. Judge Cabranes explained that non-binding General Assembly declarations "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." *Id.* at *19. More fundamentally, as Judge Randolph explained in *Al Odah*, looking to an unratified treaty or human rights agreement to establish rules of law "is anti-democratic and at odds with principles of separation of powers." 321 F.3d at 1148 (concurring).

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[8] See *Flores*, 2003 WL 22038598, at *25 n.35 (citing cases); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995); see also *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention would not be self-executing. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

Similarly, when a treaty is ratified but is not self-executing (as the President and Senate have characterized modern human rights treaties), the treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party even when jurisdiction exists. As this Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (Marshall, C.J.), overruled on other grounds, *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833). The untenable result of the Ninth Circuit's approach is to transform non-binding, non-self-executing documents—materials that are not even the result of the very constitutionally proscribed legislative process that has produced statutes from which this Court has *refused* to infer a private right of action, see, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 283 (emphasizing that a federal statute must contain an "unambiguously conferred right" for suit to lie under 42 U.S.C. 1983)—into virtually boundless sources of private rights actionable under the ATS.

Moreover, as Judge Randolph observed, permitting courts to recognize such private rights of action under the ATS not only contradicts this Court's sworn refusal to infer private rights from duly enacted statutes that do not specifically grant such rights, but it creates another anomaly—it would "grant aliens greater rights in the nation's courts than American citizens enjoy," since by its terms the ATS applies only to suits brought by aliens. *Al Odah*, 321 F.3d at 1146 (concurring). There is no basis whatever to conclude that the Congress that enacted the ATS—only a few years removed from the war that secured the Nation's independence—intended to create such a counter-intuitive regime.

b. To be sure, in certain areas, courts, in connection with matters already validly pending before them, have looked to

norms of international law to furnish a rule of decision. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That practice, however, is fundamentally different from a court inferring a cause of action as an initial matter based on international law. As the District of Columbia Circuit has recognized, international law does not generally provide causes of action enforceable in federal court. See *Tel-Oren*, 726 F.2d at 780 n.4 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied on in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they may create any enforceable rights. See Georg Schwarzenberger & E.D. Brown, *A Manual of International Law* 233 (1976). The actions or inactions of the political branches with respect to those instruments thus implicate the political question doctrine in that the actions of the political branches must be deemed dispositive as to what effect they have on the law of nations to be applied within the United States. See Pet. App. 97a.

4. Other considerations also compel against inferring a cause of action under the ATS (or creating common law

causes of action to enforce international law norms) when the political branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political branches. See *FDIC* v. *Meyer*, 510 U.S. at 486. Few matters are more directly committed to the political branches than the management of the Nation's foreign affairs. See *Garamendi*, 123 S. Ct. at 2386; *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319, 320 (1936). Indeed, the Constitution expressly gives to Congress, and not the courts, the power to "define and punish * * * Offenses against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Permitting courts to imply causes of action under the ATS from the unbounded reaches of customary international law directly infringes on the textually grounded constitutional responsibility of the political branches to exercise their judgment in setting appropriate limits on the enforceability or scope of treaties and other international legal principles. Cf. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (judicial interference is particularly unwarranted when matter is textually committed to another branch); see also Pet. App. 98a-99a.

So too, under the expansive interpretation adopted by the Ninth Circuit, ATS litigation is fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches. Under that theory, ATS actions would often involve the judiciary in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts.[9]

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[9] Recently, for example, the South African government responded to ATS litigation seeking reparations for human rights abuses during the

Moreover, under plaintiffs' approach, ATS actions are not limited to suits against rogues and outlaws. Such claims can easily be asserted against this Nation's allies, including those supporting this Nation's fight against terrorism. In this case, for example, the court has permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. The court of appeals' expansive interpretation of the ATS thus places the judiciary in the wholly unfamiliar and constitutionally inappropriate role of second-guessing political decisions regarding how the United States should respond to conduct in foreign lands or carry out international law enforcement. The profound risks threatened by such a regime are alone a sufficient ground to grant certiorari.

5. Even if the ATS could support inference of a cause of action in some instances, the court of appeals erred in inferring that it applies extraterritorially as well. Absent reason to conclude otherwise, statutes are generally presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949). Nothing in the ATS, or in its contemporaneous history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded the ATS, see p. 17, *supra*, and the only reported cases in which courts mentioned the ATS soon after its enactment involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. See *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for certain offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a *foreign country*, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795) (emphasis added).

It also bears emphasis that, as discussed above, the ATS is only a jurisdiction-vesting statute, which itself does not apply extraterritorially. Properly understood, a cause of action for extraterritorial actions would depend on a statute that both creates a cause of action and makes sufficiently clear that it applies extraterritorially. Here, of course, the Ninth Circuit inferred a cause of action in the absence of a statutory cause of action, and even many of the materials it relied on, such as the ICCPR, do not impose extraterritorial commitments. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (the typical presumption against extraterritorial application "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility").

As discussed above, the ATS was enacted to *avoid* strife with other countries. That objective does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. To the contrary,

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apartheid regime. A September 10, 2003 press release issued by the South African Government stated: "I wish to confirm that the South African Government is of the view that the litigation should be halted. It is of this view because it believes that the issues of reparations is an issue which affects South Africans and should be dealt with by South Africans, if necessary, in South African courts * * * . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardised by the litigation in New York." Ltr. from Minister Penuell M. Maduna to Judge John E. Sprizzo, Exh. 1 (Sept. 11, 2003) (on file in *In re South African Apartheid Litig.*, MDL No. 1499 (S.D.N.Y. filed Sept. 11, 2003)).

litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. That construction, moreover, would open the door to claims that U.S. activities abroad violate international law, which, if allowed under the ATS, would put courts in the role of arbitrating the exercise of the foreign affairs power that the Constitution textually commits to the political branches. That is all the more reason to doubt that the first Congress ever imagined that the ATS would be construed to open the United States courts to the sort of potentially divisive ATS litigation that has proliferated in the United States courts in the 23 years since the Second Circuit decided *Filartiga*.

D. The Ninth Circuit Erred In Holding That Alvarez-Machain's Arrest Was Not Authorized By United States Law

The en banc court's ruling against petitioner Sosa is also predicated on its holding that the arrest was not authorized under United States law. Pet. App. 44a. Notwithstanding its expansive interpretation of the ATS, even the en banc court recognized that there could be no liability under the ATS for "arbitrary" arrest and detention if the arrest and detention were taken pursuant to United States law. *Id.* at 29a. As the United States will explain in detail in its own petition for certiorari in this case, see note 1, *supra*, Alvarez-Machain was properly indicted and arrested under federal statute. The ATS claim brought against petitioner Sosa fails for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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